UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

DARRYL ASHMORE,

Plaintiff,

Case No.: 9:16-cv-81710-KAM

v.

NFL PLAYER DISABILITY AND NEUROCOGNITIVE BENEFIT PLAN,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, Darryl Ashmore, hereby responds to Defendant's Motion for Judgment on the Administrative Record ("Motion") [DE 39], and states:

I. INTRODUCTION

In its Motion, Defendant was correct in one statement – this case is frustratingly simple. In short, due to Defendant's insistence that Mr. Ashmore travel out of his home state for three medical examinations, Mr. Ashmore asked for reasonable travel accommodations. Defendant misled Mr. Ashmore into believing that his requests for accommodations were being reviewed and then blindsided him with a denial letter. Given the chance to correct its unreasonable conduct and rectify the defenseless denial when Mr. Ashmore appealed to the Board, Defendant fumbled its opportunity. Defendant simply rubberstamped the prior denial and refused to consider any of Mr. Ashmore's arguments or medical records.

Defendant's Motion is essentially 18 pages of finger pointing and blame deflection. Defendant blames Mr. Ashmore, the doctors who were completing the examinations, and the plan

provisions themselves. These attempts at placing the blame elsewhere fail, and actually highlight Defendant's unreasonableness. Defendant alone is the fiduciary charged with fairly and reasonably administering the Plan in the interest of Plan participants like Mr. Ashmore. It alone holds the power and responsibility of discretionary authority. Rather than embrace that responsibility and act in a manner befitting of a fiduciary, Defendant played a game of "Gotcha!" with Mr. Ashmore, then stubbornly doubled down on appeal. Defendant alone is the party responsible for the unreasonable administration of Mr. Ashmore's application for benefits.

II. ARGUMENT

Defendant attempts to minimize its own wrongdoing by: (i) distorting and omitting material facts; (ii) falsely characterizing Mr. Ashmore and his intentions; and, (iii) hiding behind Plan provisions despite having broad discretionary authority under the Plan. For the reasons discussed below, all three fail to withstand scrutiny.

A. Defendant's Position is Factually Incorrect

The facts of this case clearly demonstrate Defendant's unreasonableness. Knowing this, Defendant could not mount a defense while presenting the facts clearly and accurately.[1] Instead, Defendant's Motion relies on the distortion and omission of key facts. Once corrected, the facts clearly demonstrate Defendant's unreasonableness.

For example, Defendant alleges that Mr. Ashmore "simply refused" to attend the scheduled medical examinations.[2] [DE 39-1 p. 19]. This is incorrect. Mr. Ashmore consistently and repeatedly expressed his willingness to attend the examinations. Indeed, he did so in *every*

[1] Defendant failed to compile and produce a statement of facts.
[2] Defendant goes as far as asserting that Mr. Ashmore "insisted that no one in the NFL Player Benefits Office could tell him what to do," without citing to any correspondence to support such assertion. [DE 39-1 p. 7].

correspondence with Defendant, whether written or verbal. [Ashmore 91-92, Ashmore 96, Ashmore 110-111]. From the very first correspondence concerning the examinations, Mr. Ashmore emphasized he was "ready and willing to submit to the examinations." [Ashmore 91]. Then, again, in his final correspondence, he confirmed he is "willing to submit to all examinations." [Ashmore 110]. Far from refusing to attend the examination, Mr. Ashmore, *at all times*, sought accommodations and engaged in a meaningful dialogue regarding those accommodations. For Defendant to claim otherwise is a demonstrably false portrayal of Mr. Ashmore and the history of his application.

Defendant also alleged that Mr. Ashmore gave Defendant an ultimatum and stated he would only attend the examinations in Atlanta on the condition they all were rescheduled. [DE 39-1 p. 5]. Again, this is a gross misrepresentation of the facts. In truth, Mr. Ashmore asked for (not demanded) reasonable accommodations due to Defendant's persistent refusal to relocate the examinations closer to Mr. Ashmore's residence. [Ashmore 110-111]. Mr. Ashmore's requests were prompted by genuine concern about the exacerbation of his conditions. Indeed, Mr. Ashmore's mistake was not in requesting reasonable accommodations, but in trusting the Defendant to genuinely consider his requests. Mr. Ashmore hoped Defendant would consider his physical impairments and afford him reasonable travel accommodations. Clearly, he was mistaken.

In addition to making blatant factual misrepresentations, Defendant, also omitted pertinent portions of the correspondences between Mr. Ashmore and the NFL Player Benefits Office (the "Plan Office"). Such omissions were necessary in order for Defendant to create a narrative that might justify its behavior. When the omitted information is read back in, it is clear Defendant's behavior was unjustified and unreasonable.

In its Motion, Defendant states that on October 16, 2015, Plan staff notified Mr. Ashmore that all three examinations had been rescheduled for Atlanta and that Mr. Ashmore waited ten days to submit a letter protesting the rescheduled examinations. [DE 39-1 p. 12-13]. As written, it seems clear Defendant intended to place blame with Mr. Ashmore for saying nothing during those ten days. Of course, Defendant failed to mention that during those ten days, telephone conversations between Mr. Ashmore and the Plan Office remained ongoing. [Ashmore 110].[3] Defendant also chose to leave out the fact that it was Ms. Richard, of the Plan Office, who recommended that Mr. Ashmore submit his October 27, 2015 letter expressing concern and requesting accommodations. She assured Mr. Ashmore she would then present his letter to the Committee for review. [Id.]. So, Mr. Ashmore's October 27, 2015 letter requesting the Committee review various requests for accommodations, was sent after much back-and-forth communication regarding the rescheduled examinations and ultimately, at the behest of Ms. Richard.[4] In truth, contrary to Defendant's mischaracterization, Mr. Ashmore was not sitting on his hands. Rather, he proactively engaged the

[3] In his October 27, 2015, Mr. Ashmore referenced "prior correspondences or our phone conversation about Mr. Ashmore's physical inability to attend medical examinations that require significant travel." [Ashmore 110].

[4] In his October 27, 2015 letter, Mr. Ashmore referenced a prior telephone conversation and stated "[w]hen we last spoke, you had suggested I write back a letter, which you would take to the committee for consideration. As such, kindly present this letter to the committee so that they may be aware of the difficulty we are experiencing with scheduling the medical examinations due to Mr. Ashmore's physical disabilities." In this letter Mr. Ashmore requested the following accommodations:

- the examinations be broken-up into two separate trips to Atlanta;
- the neuropsychological evaluation would take place over two to three days;
- he be assigned a seat with extra leg room; and
- he be provided car service to and from both airports.

[Ashmore 110-111]

Plan Office in consistent and meaningful dialogue and followed instructions given to him directly from the Plan Office.

Defendant again omitted pertinent information when it sought to portray Mr. Ashmore as defiant in his response to Ms. Richard's email notifying Mr. Ashmore that the examinations could not be rescheduled. Indeed, Defendant only reproduced portions of the email in which Mr. Ashmore stated "it's not good enough to say you have to go [to the neutral examination] because we said so," and "I would like to hear from the committee or whoever has authority about accommodations for Ashmore." [DE 39-1 p. 13-14]. As presented, Mr. Ashmore might come off as unreasonable; however, the omitted facts give a much clearer picture.

Specifically, Ms. Richard's October 28, 2015 email came a day after Mr. Ashmore submitted his October 27, 2015 letter with the understanding that she would be presenting his letter about the need for accommodations to the Committee. Thus, Mr. Ashmore was surprised to hear back from *Ms. Richard* the following day and without any response from the Committee.[5] Understandably, he was under the impression that a decision would not be made regarding the examinations until the Committee had considered the issue. That is why, in addition to the quotes cherry-picked by Defendant in its Motion, Mr. Ashmore wrote in his response email, "**[d]id you present my letter to the committee so Mr. Ashmore's situation can be given proper consideration.**" [Ashmore-PROD 38] (emphasis added). This portion of Mr. Ashmore's email – which Defendant purposefully left out – provides context to his expectation that he would have

[5] Defendant's so-called attempt to accommodate Mr. Ashmore consisted of reaching out to the neuropsychologist to see if it was possible to split-up the testing. Dr. Macciocchi, the neuropsychologist, responded that he could not because he was booked that week. Defendant did not ask whether he could conduct the evaluation on a different week. Nor did Defendant inquire as to whether any other neuropsychologist's were available to conduct the examination. [Ashmore-PROD 30-31].

heard back from the Committee, and his frustration when he did not. To be sure, Ms. Richard clearly knew that Mr. Ashmore was expecting a response from the Committee. She wrote back that, "I will be presenting everything to the Committee."[6] [Ashmore-PROD 38.]. Ms. Richard's response was also omitted from Defendant's Motion.

Defendant's presentation of cherry-picked portions of Mr. Ashmore's email response does nothing to shift the blame. The correspondences, when read in context and in their entirety, paint a clear picture of what transpired and which party acted unreasonably. Despite Defendant's attempts, Mr. Ashmore is not the culprit.

Again, Defendant attempted to re-write the facts of this case by alleging that Mr. Ashmore requested that his "application" be presented to the Committee. [DE 39-1 p. 5]. As established above, Mr. Ashmore requested that the Committee be presented with his *letter* regarding his requests for accommodations (as Ms. Richard told him she would do), not his application. Mr. Ashmore was taken completely by surprise when he learned that his requests for accommodations had not been considered by the Committee, but that his entire application had been "considered" and denied.

When the facts are clearly and completely presented, it is evident that Mr. Ashmore acted in a reasonable manner throughout the application process. He engaged the Plan Office early on and sought sensible accommodations, then maintained a meaningful dialogue with the Plan Office. He trusted and relied on the Plan Office and was led to believe his requests were being considered and reviewed. Knowing the facts do not favor its position, Defendant resorted to rewriting the

[6] Defendant conveniently downplays the fact that, despite this reassurance, Ms. Richard cancelled all of the scheduled medical examinations immediately following her October 28, 2015 email. So, while Mr. Ashmore was patiently awaiting a response from the Committee (per Ms. Richard's instructions), the Plan had already cancelled the examinations.

history of what transpired through omission and distortion of information. However, no amount of creative storytelling can justify its treatment of Mr. Ashmore.

B. Mr. Ashmore Did Not "Game the System"

Defendant devotes much of its Motion to pointing the finger at Mr. Ashmore and seeking to portray his need for accommodations as a hoax to trick the Plan into paying him benefits. In its Motion, Defendant uses words such as "inventing," "tactic," "unjustified," "obstructionism," along with phrases such as "game the system," "obstruct the process," and "erecting every conceivable barrier" when describing Mr. Ashmore's request for accommodations. [DE 39-1 p. 6-7, 9].

Frankly, Defendant is in no position to question the reasonableness or legitimacy of Mr. Ashmore's requests for accommodations for one salient fact – it refused to review of any of the medical records in its possession. The medical evidence shows that widespread, chronic pain in Mr. Ashmore's neck, knees, and back would make it difficult for him to travel by plane for extended periods of time.[7] In ERISA benefits claims, plan administrators routinely have medical records reviewed by a medical professional to gauge whether requested accommodations are reasonable (and if disability is supported). Here, Defendant's admission that it did not have Mr. Ashmore's medical records reviewed forecloses it from arguing his accommodation needs were insincere and his requests were "based on made-up complaints." [Ex. A - *Def.'s Resp. to Pl.'s Req. for Admis., No. 2*]; [DE 39-1 p. 21].[8]

[7] This sentiment was echoed by Mr. Ashmore's treating physician, Dr. Frank Conidi, who advised against such travel because Mr. Ashmore's back issues and radicular symptoms preclude him from flying. Ultimately, Dr. Conidi recommended that any evaluations take place in Florida, and preferably within one hour from Mr. Ashmore's residence. [Ashmore 101]

[8] It should be noted that Defendant's post-hoc argument that accommodations were not truly needed was never raised by Defendant at any point prior to litigation.

Despite having absolutely no evidence to support its position, Defendant argues that, through this litigation, Mr. Ashmore "hopes to game the system and obtain benefits in circumvention of the Plan requirement that he submit to a scheduled examination." [DE 39-1 p. 7]. Surely, Mr. Ashmore did not intend to spend over two years in a dispute with Defendant without ever receiving any benefits from the Plan. If this is Mr. Ashmore's attempt at "gaming the system," he is performing poorly.

In reality, Mr. Ashmore took his duty to prove his disability seriously. He took the time and effort to submit extensive medical records to Defendant. Records that show Mr. Ashmore suffers from a constellation of medical conditions affecting his physical, cognitive, and mental state.[9] And, despite doing so, he still expressed his willingness to attend Defendant's purportedly necessary examinations. All he asked for was to be taken seriously and given reasonable accommodations to prevent a worsening of his conditions or a flare in his pain levels. Defendant did not bother to review his medical records, insisted on out-of-state examinations, blindsided him with a denial, ignored his appeal, and is now pointing the finger back at Mr. Ashmore.

Indeed, in its Motion, Defendant goes so far as to turn Mr. Ashmore's reasonable behavior into some sort of admission that his initial objections were meritless. [DE 39-1 p. 18]. It seems Defendant is arguing that Mr. Ashmore's initial requests that the examinations be located closer to his residence were proven unjustified by his later agreement to attend the examinations in Atlanta with accommodations. This argument is unsupported.

Mr. Ashmore and his treating physician initially asked for the examinations to occur in his home state of Florida. [Ashmore 101]. Once it became apparent that Defendant had no interest in

[9] Notably, after Defendant denied Mr. Ashmore's application, he underwent a comprehensive medical examination that confirmed he is significantly restricted by chronic pain, migraine headaches, confusion, depression, and multiple orthopedic issues. [Ashmore 638].

relocating the examinations closer to Mr. Ashmore, reasonable travel accommodations were requested in an attempt to prevent exacerbation of his conditions.[10] Indeed, Mr. Ashmore wrote to Defendant on October 27, 2015, and stated:

> We reiterate that Mr. Ashmore is incapable of traveling long distances and wonder why examinations must be in outside of his county in Florida, much less an entirely different state. In any event, and **in hope of moving forward**, Mr. Ashmore will attend examinations in Atlanta if he can be accommodated.[11]

[Ashmore 110]. (emphasis added).

Clearly, Mr. Ashmore was not indicating that he was "fully capable" of traveling or that he had "no problem traveling," as Defendant asserts. [DE 39-1 p. 6, 18]. Rather, Mr. Ashmore engaged in reasonable and cooperative behavior in an attempt to move forward with the application process, despite concerns over the effects of long-distance travel.

Ultimately, Defendant's attempts at pointing the finger at Mr. Ashmore fail. Mr. Ashmore is not "gaming the system" by presenting hundreds of pages of supportive medical documentation, agreeing to attend medical examinations, and repeatedly and consistently engaging Defendant with requests for reasonable accommodations. It seems that Defendant is so unfamiliar with the concept of reasonableness that it cannot even recognize it when it sees it.

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[10] Defendant informed Mr. Ashmore that there were no doctors capable of performing the examinations in Florida and that the closest doctors were located in Atlanta, Georgia. [Ashmore-PROD 38]. The emails uncovered through discovery reveal that Ms. Richard knew of a doctor closer to Mr. Ashmore and emailed Paul Scott, her supervisor asking, "[s]ince they want to break it up into two trips anyway, maybe [Dr.] Vanderploeg can do it if Macciocchi can't since he is closer?" [Ashmore-PROD- 28]. Mr. Scott responded and stated, "I would try to stick with Macciocchi." [Id.]. So, aside from the obvious point that there are thousands of doctors in Florida, it is clear the Plan Office knew of and approved a doctor who was closer to Mr. Ashmore and knowingly scheduled the examinations in Atlanta anyway.

[11] No doubt, had Mr. Ashmore again insisted on examinations in his home state (something he still feels would be reasonable given the plethora of medical practitioners in Florida), Defendant would now be arguing that Mr. Ashmore was unreasonable and unwilling to attend medical examinations.

C. Defendant Cannot Hide Behind the Plan

After attempting to place the blame on Mr. Ashmore, Defendant attempts to further distance itself from any wrongdoing by pointing to provisions of the Plan and the difficulties of plan administration. Defendant claims it had "little choice" but to deny Mr. Ashmore's application for total and permanent disability benefits. [DE 39-1 p.17]. This could not be further from the truth. In fact, Defendant acknowledges it has "'full and absolute discretion, authority, and power to interpret, control, implement, and manage' the Plan and decide claims for benefits." [DE 39-1 p. 4]. Defendant *chose* to act unreasonably.

Defendant's denial of Mr. Ashmore's total and permanent disability benefits is purportedly based exclusively on his failure to attend the medical examinations and failure to give notice that he was unable to attend the examinations. However, such examinations are not a requirement for an award of benefits. Generally speaking, in ERISA disability benefit claims such as this one, it is common for plan administrators to approve disability benefits without examinations. Here, Defendant admits it "can approve applications for total and permanent disability benefits without conducting a medical evaluation." [Ex. A - *Def.'s Resp. to Pl.'s Req. for Admis., No. 2*]. From such admission it follows that Defendant can approve benefits if the medical records alone merit such a decision. Thus, Defendant had the choice to review Mr. Ashmore's medical records and make a determination. It repeatedly chose not to do so.

In a similar vein, Defendant seems to argue that it was somehow forced to act unreasonably because it is difficult to provide for "orderly and efficient administration of the plan." [DE 39-1 p. 21]. Defendant provides the excuse that it "processes hundreds of disability applications," which requires the coordination of examinations in physicians' offices across the country. [DE 39-1 p.

20]. Providing accommodations for "Players like Ashmore," is "incompatible with the orderly and efficient administration of the Plan." [DE 39-1 p. 21].[12]

Unfortunately for Defendant, being a fiduciary is not all tea and crumpets. As a fiduciary, Defendant is expected to act solely in the interest of plan participants like Mr. Ashmore.[13] Moreover, the Plan itself requires that "[t]he Disability Board and the Disability Initial Claims Committee will discharge their duties with respect to the Plan solely in the interest of the Player and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." [Ashmore 43-44]. By making this argument, Defendant makes clear that it chose the convenience of the Plan over Mr. Ashmore's welfare. That choice, under the circumstances presented, was wrong and unreasonable.

Defendant further argues that its actions were predicated by strict time constraints imposed by the Department of Labor regulations (the "regulations") and the Plan. Indeed, Defendant asserts that "[t]ime is essential because, under the terms of the Plan and Department of Labor regulations, the Committee *generally must* decide every initial application for disability benefits within 45 days of submission." [DE 39-1 p. 10]. (emphasis added). However, Defendant conveniently stops short of mentioning that both the regulations and the Plan allow for extensions of this time period. Specifically, the regulations allow for *two* 30 day extensions "provided that the plan administrator

[12] Again, here Defendant asserts that Mr. Ashmore's complaints are "made-up." [DE 39-1 p. 21]. How would Defendant know that if it never reviewed his medical records?

[13] ERISA's purpose, embodied in ERISA § 2(b), 29 U.S.C. § 1001(b), of protecting "the interests of participants in employee benefit plans and their beneficiaries," and its fiduciary goals, expressed in ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires fiduciaries to act exclusively in the interest of the plan's participants and their beneficiaries. As a plan administrator and fiduciary with discretionary authority, Defendant is bestowed with the power to interpret and apply the terms of the Plan. But because of this power, Defendant is held to a "higher than marketplace" standard. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 118.

both determines that such an extension is necessary due to matters beyond the control of the plan." 29 C.F.R. § 2560.503-1(f)(3). The Plan mirrors this language and stipulates that the Committee is expected to communicate its decision within 45 days after receipt of the claim, but this time period "can be extended twice by 30 days if, prior to the expiration of the period." [Ashmore 53]. An extension would have been appropriate here where Mr. Ashmore engaged Defendant and was waiting for an answer to his requests for accommodations. Defendant cannot blame time pressure for its unreasonable behavior.

In the face of evidence of unreasonableness, Defendant asserts that the Plan's structure ensures impartiality. But, Defendant certainly is not immune from making decisions in its own self-interest. Take, for example, in *Solomon v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 860 F.3d 259 (4th Cir. 2017), the Fourth Circuit found that this same plan (with the same plan structure) "abused its discretion when it arbitrarily denied Solomon Football Degenerative benefits." Significantly, the Court held that "[a] fiduciary must rely on substantial evidence to sustain its denial of benefits and thus abuses its discretion when it ignores unanimous relevant evidence supporting an award of benefits." Here, Defendant ignored *all* relevant evidence supporting Mr. Ashmore's total and permanent disability. Such flat refusal is a clear breach of the Plan's terms and Defendant's fiduciary duty under ERISA.

Importantly, Defendant had the opportunity to correct any mistakes or misconceptions relating to the examinations and provide a full and fair review when Mr. Ashmore submitted his appeal. Defendant chose not to do so. Defendant chose not to conduct a medical review of Mr. Ashmore's file, chose not to reschedule the purportedly necessary examinations, and chose to

rubber-stamp the initial denial. Defendant now makes little attempt to justify its appeal review in its Motion and, indeed, it would be difficult to do so given Defendant's clear unreasonableness.[14]

Ultimately, Defendant's attempts to blame the terms of the Plan and the difficulty of plan administration fail. Defendant had the authority and opportunity to make the right choices. It simply chose not to do so.

III. CONCLUSION

Defendant cannot erase its unreasonable behavior by pointing the blame at others. The fact is, Defendant repeatedly failed to conduct a full and fair review of Mr. Ashmore's application and revealed its self-interest at every step along the way. Its Motion does little to justify its actions.

Respectfully submitted this 13th day of November, 2017,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Motion with the Clerk of Court by using the CM/ECF system, which will, in turn, send a notice of electronic filing to Defendant's attorneys:

Michael Junk, *pro hac vice*

[14] Because Defendant failed to seriously consider the points raised in Mr. Ashmore's appeal, it glosses over the appeal in hopes of not highlighting its failure in this regard.

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